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**BEFORE THE**

**Federal Communications Commission**

**WASHINGTON, D.C. 20554**

**RECEIVED**

**JUL 21 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of Section 73.202(b), )

Table of Allotments, )

FM Broadcast Stations )

(Bradenton and High Point, Florida) )

MM Docket No. 92-59

RM-7923

RM-8042

To: Chief, Allocations Branch

site zone for Channel 278C at Bradenton are unsuitable for a tower high enough to meet the FCC's minimum requirements for such a station. More particularly, the FAA has issued a preliminary determination that a tower for a full Class C station would not be permitted at the very allotment reference site which has been specified by Sunshine. See Petition for Reconsideration, Attachment 1.

In response to the Petition, Sunshine merely reiterates arguments it made over a year ago. These arguments again fail to rebut the showing made by ECI. Although Sunshine continues to challenge ECI's showing, the arguments raised are either irrelevant, inaccurate, or speculative. Indeed, by consistently focusing its counter-argument on the contention that airspace considerations in the Tampa Bay area are/were changing, Sunshine appears to have tacitly conceded all along that existing FAA regulations would preclude it from building the tower proposed. For example, while gratuitously attacking ECI for requesting an FAA ruling on the suitability of the allotment reference site, Sunshine has never challenged the fact that the FAA's preliminary assessment deemed that site unsuitable. Instead, through use of vague assertions and dubious logic, Sunshine managed to successfully muddle the issues so thoroughly that the Allocations Branch granted the upgrade. Now that additional time has passed,

however, it has become quite clear that the changes relied upon by Sunshine either have not taken place (and will not take place), or do not have the effect claimed by Sunshine.

Significantly, both parties agree that Commission precedent requires consideration of evidence that a proposed fully-spaced transmitter site is unsuitable for use based upon practical considerations, including air safety. See FM Table of Allotments (West Palm Beach, Florida), 6 FCC Rcd 6975, 6976 (Pol. & Rul. Div. 1991); Petition to Deny at 5; Opposition at 2. More importantly, in its recent adoption of a "one-step" procedure for FM facility upgrades, the Commission itself made clear that it would require applicants to include "a separate exhibit to the application which shows that the allotment reference site would meet allotment standards with respect to spacing . . . and that it would be suitable for tower construction. . . . [E]xamples of unsuitable allotment reference sites include those . . . which would necessarily present a hazard to air navigation." Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, FCC 93-299, at ¶ 13 n.19 (released July 13, 1993) (emphasis added) ("FM One-Step Applications"). The Commission therein made clear that these requirements were not an expansion of prior criteria, "but merely follow our established practice." Id. at ¶ 13.

Stating that "we wish to make our intentions abundantly clear," the Commission emphasized that "[w]here a station seeks a modification using the one-step process, and is unable to demonstrate that a suitable site exists that would meet allotment standards for the station's channel and class, that application would be dismissed, even if the facilities which the applicant intends to build would otherwise comply fully with Commission [application] standards." Id. at ¶ 14 (emphasis added). Among other things, this decision makes clear that there is a distinction between the availability of a site, which an upgrade proponent is not required to demonstrate affirmatively, and the suitability of a site, which an upgrade proponent is affirmatively required to demonstrate -- a critical factor which Sunshine has failed to establish in this instance.

ECI, in fact, has affirmatively demonstrated that the allotment reference site is not suitable, and Sunshine has not even attempted to rebut that showing. Sunshine has not once identified any specific location which is suitable for use as a transmitter site; at best, Sunshine has been able only to contend that there might be a site within the fully-spaced site zone, despite the fact that Sunshine has not gone to the trouble to identify one. This lack of concern with the unsuitability of a transmitter at its proposed coordinates is an evident

manifestation that Sunshine does not intend to construct a tower within the fully-spaced area. See ECI Comments, MM Docket No. 92-59, at 8-9 (filed May 21, 1992). Proponents of an upgrade ought not to be permitted to flout so readily and so transparently the Commission's still unwavering requirement in rulemaking proceedings that an allotment be based on the suitability of a fully-spaced transmitter location.

Sunshine is equally cavalier in its treatment of the facts, faulting ECI for not having fully considered the announced closing of MacDill Air Force Base in its initial aeronautical study -- and then, incredibly, attempting to obscure the fact that MacDill Air Force will actually remain open to military and civilian aircraft. See Opposition at 5; cf. Petition for Reconsideration, Attachment 3. While Sunshine concedes that the need for minimum vectoring altitudes will remain, it asserts non-specifically that they will be "changed," because "MacDill no longer has a need to recover an F-16 training wing." Id. Sunshine offers absolutely no foundation, however, for its assertion that these "changes" will occur, nor does it explain what the changes are, or how they would affect air space considerations relative to transmitter height. Thus, even had Sunshine actually stated its apparent inference that the absence of F-16 aircraft from MacDill would remove the sole impediment to

its construction of a 1000' plus tower, such a conclusion does not follow from the premises given. In essence, Sunshine argues that the mere occurrence of minor changes in air space use in the Tampa Bay area should prompt the Commission to simply assume that a 1000' plus tower might be permitted, and ignore the fact that these changes are not substantial enough to make Sunshine's proposal acceptable.

Similarly, Sunshine continues to assert that ECI's consultants "did not take into consideration the establishment of the Tampa Terminal Control Area," which has a "significant impact" on visual flight rule ("VFR") routes in the area. Opposition at 4. In fact, however, the implementation of additional airspace controls relevant to the Tampa International Airport, does not, as Sunshine suggests, eliminate the need for the VFR routes associated with the Tampa Bay coastline and major highways in the area. Pilots will continue to require defined landmarks for VFR navigation in adverse weather conditions. These VFR routes permit aircraft to descend to an altitude of 500 feet and follow readily identifiable physical features -- none of which has been moved or changed. Thus, it is an absolute necessity that these routes contain no unnecessary obstacles that might be difficult to identify in bad weather, e.g., a tall radio transmitter tower. Although pilots may not fly as low over

congested areas, the areas referred to by Sunshine -- Sun City, Sun City Center, Ruskin and Yankee -- are all located at substantial distance from the site proposed by Sunshine and would have no impact on a pilot's expectation of safe navigation at 500 feet. See Declaration of John Chevalier, Jr. at 4-5, dated July 10, 1992, attached hereto.

Finally, Sunshine once again assails ECI and its airspace consultant for having the temerity to actually request a preliminary judgment from the FAA as to whether a 1025' foot transmitter tower would be permitted at the allotment reference coordinates specified by Sunshine itself. Sunshine maintains that the request submitted on ECI's behalf was "false" because neither ECI nor the airspace consultant intended to construct the facility specified. See Opposition at 5-7.

On the other hand, as noted above, Sunshine has never disputed the fact that the FAA's initial review of the allotment reference site found it unsuitable for construction of the facility proposed. Oddly, Sunshine has consistently appeared to have little interest in whether it would be permitted to construct a tower of adequate height within the permitted site zone for its proposed facility -- so little interest that it was ECI that was forced to seek FAA analysis of the proposal, when this burden actually should have fallen on Sunshine in response

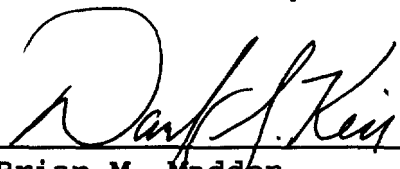
to ECI's initial showing that the site was unsuitable. The certification contained in the request to the FAA was premised on Sunshine's own expression of intent to construct a transmitter tower; the coordinates used were the only coordinates ever advanced by Sunshine in connection with its allotment proposal. Thus, if the information contained on the FAA form is inaccurate, it is because Sunshine has misled ECI and the FCC by proposing a transmitter site in an area where it has no intention of constructing such a facility.

Because Commission precedent requires that all channel allotments be made only in full compliance with the Commission's minimum separation rules, and Sunshine has never established that even a single site exists which will be suitable for use as a transmitter site in compliance with the separation rules, the substitution of Channel 278C for 277C1 at Bradenton should not have been adopted. In making the allotment despite its fatal deficiencies, and without any explanation of its deviation from prior cases, the staff acted contrary to established Commission policy that no allotment will be made for a short-spaced proposal. See Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas, 6 FCC Rcd 5356, 5358 (1991).

If this allotment were to be upheld, it effectively would amend the Commission's rules to allow proponents to obtain new or upgraded allotments premised upon proposals that utilize short-spaced facilities. Such a step would be highly unusual given the Commission's very recent affirmation, just one week ago, of its existing policy to the contrary. See FM One-Step Applications, supra. The decision of the Allocations Branch in this instance was plainly beyond the authority delegated to it by the Commission. Such an abrupt departure from precedent cannot be taken without a full explanation of the reason for the change, see International Union v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir 1972), a standard not met by the decision of the Allocations Branch in this proceeding.

Respectfully submitted,

ECI LICENSE COMPANY, L.P.

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July 21, 1993

Its Attorneys

**ATTACHEMENT**

DECLARATION

I, John Chevalier, Jr., hereby declare, certify and state as follows:

I am the President of Aviation Systems Associates, Inc. (ASA), located at 23430 Hawthorne Blvd., Suite 200, Torrance, California 90505.

Aviation Systems Associates, Inc., has been in existence for 20 years and provides aviation technical and regulatory consulting services in all areas of aviation activity. Our Staff of over 50

Hazard Determinations, and providing assistance and advice on acceptable marking and lighting systems.

My personal experience covers some 48 years in aviation, including air traffic control operational and facility management, procedures and airspace development and policy, development and implementation of criteria and policy regarding obstruction evaluation matters, and development, drafting, and implementation of Federal Aviation Regulations involving airspace utilization and operations. Approximately 12 years were spent in the Procedures and Airspace Divisions in the FAA Washington Headquarters. Of particular significance, in Washington I was the original Project Manager for the Terminal Control Area plan and developed and drafted all of the proposed and final Federal Aviation Regulations and procedures governing operations in and around TCAs. I also drafted the TCA airspace descriptions for the first 22 TCA locations throughout the Country. My resume detailing other experience is attached hereto.

While based in FAA Washington, I also authored and amended, on a continuing basis, FAA Handbook 7400.2, "Procedures for Handling Airspace Matters". Handbook 7400.2, among other things, sets out policy, criteria, and responsibilities of FAA personnel throughout the U.S. in the performance of obstruction evaluation studies of all proposed structures within the purview of FAR 77. Handbook 7400.2 is one of the publications noted in FAR 77.3 (b) which are used in the conduct of obstruction evaluation studies.

ASA previously prepared a Study discussing substantial adverse aeronautical impacts that would result from a proposed 1049' FM

antenna tower at 27°-49'-20" North Latitude, 82°-21'-50" West Longitude. The ASA Study concluded that if such a proposal were filed, FAA would issue a Determination of Hazard.

The ASA Study was reviewed by Airspace Consultant John P. Allen who disagreed with the stated impacts and conclusion.

Mr. Allen's rebuttal points concerned the following ASA stated impacts:

1. VFR Route Impact:

The proposed site is within the airspace two statute miles each side of several natural or manmade landmarks (I-75, U.S. Highway 41, and the Coastline).

As stated in FAA Handbook 7400.2, "Pilots operating VFR over most portions of the United States are encouraged to fly routes that parallel rivers, coastlines, mountain passes, valleys, and similar types of natural landmarks or to follow major highways, railroads, powerlines, canals, or other manmade objects. The basic consideration in evaluating the effect of obstructions on operations along these routes is whether pilots would be able to visually observe and avoid them during marginal VFR weather conditions." (7400.2C, paragraph 2421.g) Further, "Evaluation of obstructions that would be located within VFR routes must consider the fact that pilots may and sometimes do operate below the floor of controlled airspace with low ceilings and 1 mile flight visibility." (7400.2C, paragraph 2422.b).

Mr. Allen contends that other airspace requirements, changes, and factors make these VFR routes go away. That is not the case. The proposed site is within the VFR route airspace of three very prominent landmarks available and often used for VFR navigation under deteriorating weather conditions down to 500 feet above the surface. Mr. Allen's contentions that the 1200 foot floor of the Tampa TCA over the site and the TCA requirements for altitude reporting (Mode C) transponder and two-way radio would cause the VFR route to shift eastward to Highway 301 simply have no bearing. (As a matter of fact, Mr. Allen misstates the TCA regulation regarding two-way radio communications. This requirement applies within the TCA airspace, not below the floors of the TCA - here 1200 feet.) The VFR routes are still there and, as a practical matter, the 1200 foot floor would encourage the pilot to go down lower to his 500 foot minimum. Also, contrary to Mr. Allen's allusion regarding Mode C, two-way radio (which is wrong), and Highway 301, the requirement for Mode C extends further East to the 30 NM "TCA veil", or about 20 miles East of Highway 301. So the same transponder requirement would also apply over Highway 301.

Mr. Allen further states that somehow the 1000 foot minimum safe altitude provision of FAR 91.119 would apply due to the congested areas of Sun City, Sun City Center,

Ruskin, and Yankee. These towns or settlements are, respectively, 12, 7 1/2, 8 1/2, and 5 statute miles from the tower site. FAR 91.119 (b) only requires the pilot to operate, when over a congested area, at 1000 feet above the highest obstacle within 2,000 feet of the aircraft. When over other-than-congested areas (such as the proposed site) the pilot may operate down to an altitude of 500 feet above the surface (91.119 (c)). Therefore, the towns cited have no bearing on the pilot's prerogative to operate down to 500 feet.

2. Radar Minimum Vectoring Altitude (MVA):

The MVA over the tower site presently is 1600' MSL. With the tower proposed at 1049' MSL, the MVA would need to be increased to 2000' MSL. The minimum vectoring altitudes, as established, are important to the total control of all IFR and VFR traffic to all of the airports in the Tampa TRACON airspace, not just, as in this instance, for MacDill AFB.

Also, as far as military base closures go, to our knowledge, every military base slated for closure is being hotly pursued by local authorities for conversion to civil aviation use or joint military/civil use. Therefore, the need for retention of minimum vectoring altitudes will remain. Further, in our coordination with FAA we have not learned of any relevant airspace changes

under consideration for Tampa/MacDill terminal area, and expect none that would have any bearing.

3. Tampa Terminal Control Area (TCA):

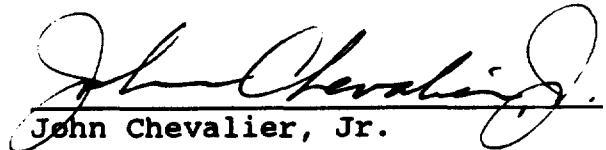
TCA airspace is designed, intended, and regulated to provide complete positive control airspace protection for operations to and from the Primary Airport (here Tampa International) and for other operations within the TCA. All of the TCA locations are continually evaluated for safety, efficiency, and effectiveness. TCA airspace areas are always subject to amendment or alteration to continue to provide complete positive control protection for aircraft to and from the airport surface at Tampa International, through all phases of approach and departure flight, to and from the overlying Positive Control Airspace. All regulatory or procedural changes and tailoring of TCA airspace areas are directed to this goal. No changes, conversions, or reuse of MacDill AFB

congested" areas and the Federal Aviation regulations allow operation of aircraft at the site down to 500 feet above the surface. The towns and settlements noted by Mr. Allen are far from the tower site and do not impose any higher minimum safe altitudes for the pilot over the site.

3. The minimum radar vectoring altitudes in place are necessary for the safe and efficient air traffic control handling of aircraft in the Greater Tampa area.
4. Any airspace revisions or TCA modifications that may be now or later considered would have no mitigating effect upon the adverse impacts of the proposed tower.
5. FAA obstruction evaluation studies are made on the basis of existing factors, not on what they used to be or may be in the future.

In view of the above, it is my professional opinion that a proposal to FAA for a 1049' MSL structure at the site proposed, or anywhere within the FCC permissible area would result in FAA issuing a Determination of Hazard.

I hereby declare, certify and state, under penalty of perjury, the foregoing is true and correct, to the best of my knowledge, information and belief.

  
John Chevalier, Jr.

Executed on: July 10, 1992

# John Chevalier, Jr.

President and General Counsel

## • General Qualifications

Mr. Chevalier, the founder of ASA, has over 43 years of aviation experience including 27 years with the FAA and Army Air Corps. From this experience, Mr. Chevalier has developed nationally recognized expertise in airspace analysis, aircraft accident analysis, expert witness testimony, and in negotiations with the FAA on the aeronautical effect of potential airspace obstructions.

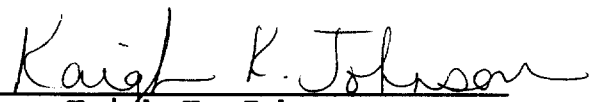
**CERTIFICATE OF SERVICE**

I, Kaigh K. Johnson, hereby certify that a true copy of the foregoing "Reply of ECI License Company, L.P." was mailed the 21st of July, 1993, via first class mail, postage prepaid to the following:

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\*By Hand Delivery